ESSAY: TELLING STORIES OF SHAREHOLDER SUPREMACY

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INTRODUCTION

Lawyers are in the business of describing and simultaneously creating a moral universe.[1] We cannot describe without changing what we are describing, but, on the other hand, there is no creation *ex nihilo* in the law. We create only from the standpoint we are given. Thus, we are constrained by the nature of the morality we are describing and trying to influence. And, much to our regret, we constantly rediscover that our moral universe is not simple or unified, but complex and contradictory—a constant intellectual struggle between competing ideals that parallels the real-world political struggles between competing people, parties, and goals.

A strand of western philosophy—starting with Aristotle, and epitomized in the modern era by Rawls' reflective equilibrium—attempts to im-

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1. *See generally*, Robert M. Cover, *Nomos and Narrative, in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 95, 95-172 (U. MICH. PRESS 1995) (describing creation and destruction of law through legal narrative).

pose unity on the disorder of our moral understandings.[2] By articulating more careful distinctions or grander syntheses, these theorists imagine they can find the simple truth behind our complex beliefs. Similarly, Dworkin's Hercules and the Restatements' reporters seek to build coherent and internally consistent logical structures.[3] But the effort fails in philosophy and law alike. Instead, we repeatedly find our moral and legal universes to be fractal, with the contradictions and difficulties repeating themselves at every level.[4] Disagreement is fundamental: not just between people but even within each individual's own views. Reflection, pressed hard enough, leads us not to equilibrium but to the dangerous and unsustainable extremism of the true believers or to more or less unconscious oscillation between contradictory claims.

At its core, corporate law, like most law, is a morality play. Its internal structure is not determined by logic, justice, or efficiency. Instead, doctrine and action alike flow from a highly contested argument over status and position. Holmes had it partly right: "the life of the law has not been logic."[5] But it has not "been experience," a non-reflective naïve pragmatism or a mere superstructure passively reflecting underlying class struggle, either. The law is a conflict of narratives. The stories it tells have independent power that can influence, as well as be influenced by, the struggles that create it and which it mediates.

Mae Kuykendall contends, in the article that inspired this symposium, that corporate lawyers tell no stories.[6] I believe she has it precisely backwards. All we do is tell stories. The power of corporate law ideology has virtually nothing to do with experience and lies less in its internal logic or consistency than in its literary excellence: the quality of its stories.

The stories lawyers and their audiences tell define the characters of corporate law. Our stories enable actors to pose as the good guys, the heroic saviors, or the beneficent gods. Alternatively, they relegate them to the roles of the evil stepmother, the sneak-thief or the neighborhood bully. In turn, the characters we assign and play are far more important in determining corporate behavior, judicial rules, and governmental regulation than we generally acknowledge.

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2. JOHN RAWLS, THEORY OF JUSTICE 20 (1971) (contending that we can reach a "reflective equilibrium" in which seemingly inconsistent views form a coherent whole).

3. RONALD DWORKIN, LAW'S EMPIRE 239-75 (1986) (offering image of the judge as Hercules, struggling to impose consistency on the stories of the law, as if consistency were a more important value than, for example, justice).

4. *See, e.g.*, James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003 (appendix) (1985); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211-15 (1979); *see generally*, KARL LLEWELLYN, THE BRAMBLE BUSH (1930).

5. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).

6. Mae Kuykendall, *No Imagination: The Marginal Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537, 560 (2007).

Indeed, in the end the stories trump just about everything else.[7] If, as the most popular story of the long Reagan era has had it, corporations are heroic entrepreneurs, with managers who are constrained by the beneficent gods of the Market to act only in the interests of shareholders, who, in turn, are democratic reflections of the true interests of society as a whole, then the law must adjust to follow. If, as one interpretation of the ever-popular Berle and Means narrative has it, shareholders are "owners," then perhaps they have natural rights to the product of their labor, even if they have not labored and the law gives them none of the usual responsibilities or rights of ownership.[8] If, as the agency theorists tell it, shareholders are "masters," then they must be in mastery of something beyond the arts of speculative trading, and their "servants" must be obliged to abandon ordinary capitalist self-interestedness in favor of renunciation of self, "however hard the abnegation"[9]—and if corporate law statutes are to the contrary, so much the worse for the statutes. Conversely, courts occasionally clear the "mists of metaphor" to declare shareholders liable for the debts of their corporate agents, again without strict regard for statutory details.[10]

If corporations are separate from their shareholder "owners" or "members" or "voters," then perhaps there is no moral issue if the shareholders take no responsibility for corporate debts incurred in the course of making them profits; conversely, if corporate existence is a mere fiction, then it must follow that taxing the corporation on its own income is "double taxation" and wrong. If the corporate shareholders are its "members" and corporate share voting is "democracy," then other participants must be helots or colonized natives, entitled only to such consideration as is necessary

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7. *See generally*, Daniel JH Greenwood, *Introduction to the Metaphors of Corporate Law*, 4 SEATTLE J. SOCIAL JUSTICE 273 (2005).

8. ADOLF BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 3-10 (rev. 1967) (1932) (introducing the peculiar concept of "the separation of ownership and control"). Berle and Means generally seem to be arguing that modern corporations do not have "owners" in the traditional property sense, since property owners, unlike shareholders, both control and are responsible for their property. *Id.* at 5. Indeed, their immediate contribution to corporate law was to emasculate the potent owner into a new, passive widow or orphan shareholder, needing the strong paternal protection of the Federal securities acts, which were inspired by their book. In corporate law proper, however, their slogan has had a life separate from their feminizing image. The "separation of ownership and control" has come to stand for the odd idea that shareholders "own" the corporation despite having neither control nor responsibility, or are its "principals" despite the law of agency, and therefore have some sort of entitlement to benefit from the firm beyond their legal rights or economic contribution. In real life, of course, one of the primary motivations for adopting the corporate form is to ensure that shareholders are not principals and corporations are not their agents. *See*, Berkey v. Third Avenue Railway Co., 244 N.Y. 84, 95 (1926) (Cardozo, J.) (holding shareholder liable for corporate debts on ground that shareholder treated corporation as an agent).

9. Meinhard v. Salmon, 249 N.Y. 458, 468 (N.Y. 1928) (opinion by Cardozo, J.).

10. Berkey, supra, 244 N.Y. at 94.

to exploit them with maximum efficiency, and any notion that employees might be fellow citizens entitled to respect and consideration must carry a faint odor of subversion. If employees are costs, as our accounting portrays them, then it must be right to treat them as mere tools to a greater end.

If corporations are private, then even the strictest of purportedly strict constructionists will have no trouble seeing that they need constitutional protection from an overbearing government, regardless of eighteenth-century texts or political theory that view the state as a sort of corporation and the corporation as a state-like "body politic."[11] And, most importantly of all, if the corporation is a single individual, then clearly it cannot be a conspiracy in restraint of trade, unfair competition, or monopoly even though "experience" might suggest that corporate form is a device to allow many disparate investors to act as a unified body in negotiating with other, less-united, market actors.

I. NARRATIVES OF CORPORATE LAW

Corporate and securities law are driven by several large narratives, by which I mean coherent (in narrative, not logical) and complex stories, extending beyond simple metaphors or framing.[12] Consider the following:

A. Heroic Entrepreneurs and Medieval Oppressors

Perhaps most significantly for politics generally, important issues of corporate status that we usually don't think of as corporate law—corporate lobbying and electioneering, corporate crimes, torts and regulatory violations, and the subsidies and exemptions we routinely grant corporations—are driven by two competing stories suggesting two quite different ways to understand complex corporate institutions.

On the one hand is a popular story of the corporation as individual entrepreneur. In these stories, corporations are anthropomorphized into indi-

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11. *E.g.*, John Locke, Second Treatise of Government ch. viii, ¶ 96 (1690, 1764) (analogizing state to corporation), Chisholm v. Georgia, 2 Dall. 419, 468 (1793) (opinion of Cushing, J.) ("all States whatever are corporations or bodies politic"), 1 S. Kyd, A Treatise on the Law of Corporations 13 (1793) (describing corporation as a "body politic"), Providence Bank v. Billings, 29 U.S. 514, 516 (1830) (quoting 1791 charter creating bank as "body politic" with usual powers including powers to enact a constitution, by-laws and ordinances).

12. On framing, *see generally*, GEORGE LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS (1987). The language of corporate law regularly invokes war or fiercely fought team sports, reflecting the dual moralities of team solidarity and competition with the opposing team that are paralleled in corporate law's distinction between fiduciary duty (within the team) and the market-contract self-centeredness purportedly "trodden by the crowd." *Meinhard*, 249 N.Y. at 464. This essay, however, focuses on larger scale stories that can plausibly be thought of as narrative rather than metaphor.

vidual heroes in a Social Darwinian conflict right out of Herbert Spencer. The noble firm stands up for freedom against an oppressive government or the malevolent forces of nature and entropy.[13] In these stories, corporations are portrayed as individuals rather than bureaucratic organizations, as if they were "natural" in the natural rights sense, and as if they were subjects of government rather than governing institutions themselves.

In opposition to this collection of myths is an alternative image of the corporation as the successor to medieval corporatist oppressors. In the counter story, still current in popular culture if no longer influential in the law, corporations appear as the paradigm of oppression itself, modern monopolists combined with ancient aristocratic privilege to compose a new feudalism.

It is the conflict between these competing stories, far more than internal legal logic, efficiency driven economics, or rational social planning, that structures and, in the end, determines the debate over the largest issues of corporate status. In the Supreme Court, the story of the corporation as a private individual has won near total victory.[14] In the Court's narratives, the corporation appears as a Kantian end in itself and a bearer of Lockean natural rights—not merely a human being but an actual citizen.[15] It is an entrepreneur in the tradition of John Galt[16]—simultaneously dynamic, ruthlessly productive, selfish, unpatriotic and thin-skinned, always ready to abandon the common enterprise or drift into anti-social, if not criminal, behavior if not continuously coddled and wooed. Never inspired by the work itself, this corporation instead epitomizes Weber's Protestant ethic, forever investing for an ever-deferred future.[17]

But the alternative story of corporations as potential oppressors—accumulations of unresponsive power that are at least as scary as elected governments, always in danger of moving from functioning "as Hedges are

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13. HERBERT SPENCER, SOCIAL STATICS 137-140 (1851); cf. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics").

14. Citizens United v. FEC, -- U.S. --, 2010 WL 183856 (2010), decided as this Essay was in final edits, merely confirms the point. The opinion of the Five is virtually devoid of reasoning other than a simple rhetorical equation of money with speech and campaign finance regulation with censorship. The argument derives whatever power it has from an image of corporations as individual citizens, entitled to have the government take their interests as its own, and needing judicial help, like some sort of discrete and insular minority, to protect them from legislative oppression.

15. *See generally*, HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 269 (emphasizing that human rights, without rights of nationality, proved worthless) (1951, 1973).

16. *See generally*, AYN RAND, ATLAS SHRUGGED (1957).

17. MAX WEBER, PROTESTANTISM AND THE SPIRIT OF CAPITALISM 60, 62-3, 68, 71 ("the old leisurely and comfortable attitude toward life gave way to a hard frugality in which some … came to the top, because they did not wish to consume but to earn") (Talcott Parsons trans. 1930, 1958) (1905).

set, not to stop travelers, but to keep them in the way"[18] to organized banditry—has a great deal of resonance in other areas of our politics. Every consumer knows that large corporations are often utterly unresponsive despite the myth of consumer sovereignty; every newspaper- or blog-reader knows that corporations often compete by lobbying for the right to act dubiously rather than by increasing efficiency.[19] Every citizen knows someone whose economic status is unstable or declining in our corporate dominated market, and many must wonder whether employers that seem always ready to fire or outsource or downsize really are promoting the best interests of our society.

Implicit in the populism of the right and the reformism of the center-left are worries about corporate decisionmakers discovering the fun and profit of externalizing costs, exploiting the vulnerable, or simply finding a market niche in which the firm can skim wealth without producing commensurate value. The recent financial crisis and recession, apparently caused by an unprecedented growth in a financial sector that has specialized in creating the appearance of wealth for its customers while, in reality, transferring an ever-larger part to itself, has only reemphasized traditional fears of corporate dynamics dating back at least to Adam Smith and Edmund Burke.[20] When financial wizards spend their time creating new secur-

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18. As Hobbes describes the proper role of the laws. THOMAS HOBBES, LEVIATHAN, ch. XXX (1651) (standard edition) (spelling and capitalization as in original).

19. Five members of the Supreme Court, however, seem innocent of this common knowledge. Citizens United v. FEC (2010) (arguing that the main problem of campaign finance is governmental censorship, while dismissing the possibility that corporate campaign expenditures might be intended to or have the effect of influencing governmental decision-makers). The view that money can corrupt elections even without direct "quid pro quo" bribery is not a novel notion. *See, e.g.*, Edmund Burke's denunciation of the corrupting power of the money of the East India Company: unlike our Justices, he feared that money had already led to electing "some politicians, for subverting not only the liberties of this country, but all steady and orderly government, by the money furnished by the devastation of India," quoted in ISAAC KRAMNICK, THE RAGE OF EDMUND BURKE 130 (1977).

20. Smith famously, if wrongly, predicted that no corporation could ever compete successfully in free markets, because corporate managers would never look after someone else's business as well as their own. "The directors of such companies, however, being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. ... [Corporations] very seldom succeed[] without an exclusive privilege; and frequently have not succeeded with one. Without an exclusive privilege they have commonly mismanaged the trade. With an exclusive privilege they have both mismanaged and confined it." ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Bk V, ch 1, para 107) (1776). In fact, however, the division of labor—Smith's other great insight (*id.* at Bk I, ch 1)—has proven far more important than slacker tendencies in the executive workforce. Burke's concern was more apt, especially in our recurrent crises: he noticed that the executives of the East India Company consistently managed to enrich themselves, often at terrible cost to the Indian population, without creating any value for the company's investors or either British or Indian society. "For so long as a System prevails, which regards the Transmission of great Wealth to this

ities that no one really understands and suddenly triple their share of the national income, the easiest explanation is that they have found a way to abuse their offices to gamble at our expense.[21] (So the popular narratives tell it. A closer look might give a different picture, of conceptually simple but difficult to quantify combinations of leverage and diversification sold to clients who probably did not need either but were definitely incapable of properly pricing the risk they were assuming: just an old-fashioned boiler room scam in a new suit, sold, as always, to marks just sophisticated enough to realize that someone else was making the money they wanted, or in a new twist, to bonus driven finance employees confident that their own bosses would see the wins but not the odds. That story—The Grifters of Wall Street—still waits for its Upton Sinclair, Thomas Wolfe, or Frank Partnoy. Because it would imply that not merely the sellers but the customers, including Main Street's corporate treasurers, either are corrupt or weren't listening when they learned basic finance, this not-yet-popular story would lead to quite a different set of legal interpretations, focusing less on the in-

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Country, either for the Company or the State, as its principal End, so long will it be impossible that those who are the Instruments of that Scheme, should not be actuated by the same Spirit for their own private Purposes . . . . It is not reasonably to be expected, that a Public, rapacious and improvident, should be served by any of its Subordinates with Disinterestedness or Foresight." 5 WRITINGS AND SPEECHES OF EDMUND BURKE 222 (P.J. Marshall ed., Clarendon Press 1981), discussed in Daniel J.H. Greenwood, *Markets & Democracy: The Illegitimacy of Corporate Law*, 74 UMKC L. REV. 41, n.14 (2005). Burke's basic theme could be easily modernized into a stylized account of too much of our financial industry: taking other people's existing property, especially when it is legal, is often far easier than finding ways to create new sources of productive value. And the corporate form can easily degenerate into highly organized protection rackets or worse.

Smith and Burke's view of corporations was widely shared in early 19th century America. *See, e.g.*, HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 23 (1991) (describing Jeffersonian hostility to corporations); JAMES W. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE UNITED STATES 30-45 (1970) (describing suspicions of Gouge (1833) and others regarding corporations, echoing Smith almost verbatim).

21. The massive pay for banking and finance executive that became customary in the last couple of decades certainly suggests that these fiduciaries are not practicing a great deal of renunciation of all thought of self, "however hard the abnegation." *Meinhard*, 249 N.Y. at 468. However, the problem is not actually a failure of fiduciary law. The profits of the principals—whether investment banks or hedge fund managers—are equally likely to be derived from unproductive trading, shifting risk to the unwary and other socially destructive practices. Companies that specialize in selling diversification to the diversified, insurance to customers without insurable interests, legal ways to avoid taxation or regulation or shift internal power dynamics, or complicated ways to shift risk to replace simple ways to absorb it, are far more likely to be externalizing their (or their customers) costs than increasing society's net wealth. Like any traditional aristocracy, they are likely to be primarily in the business of using power to extract wealth, not create it. And even when customers "voluntarily" pay to join protection rackets, they usually understand that they'd be better off if they faced a more attractive option set. For an account of corporations and states as protection rackets, see ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 12-18, 289 (1974).

stitutions than on the corrupting influence of teaching officials to be profit-maximizers.)

It is the competition between these two narratives—the vision of corporation as individual entrepreneur or as collective warlord oppressor—that structures our debate over the place of corporations in our politics. None of text, history, legal logic, nor structure can explain how business corporations—obviously bureaucratic and collective—ended up protected by the Constitution rather than restricted by it. The arguments make no sense. The story, however, is coherent and comprehensive, whether you agree with it or not.

B. Castrating the Father

Corporate law proper is dominated by an oedipal myth of a highly gendered male shareholder threatened with emasculation, or perhaps only cuckolded, by his children, the usurping managers. The law must rescue the old king in the name of order and tradition, even while recognizing that a man who would need rescuing from this is not fully a man in any event.

Perhaps this is why private equity or portfolio traders potently asserting control and mastery in the name of shareholders can seem heroic, despite the absurdity of imagining that we could solve the agency-cost problem by adding another, more highly paid level of agents—skilled mainly in the arts of extraction—between passive capital and the active business. As economics, the solution makes no sense, except as system of skimming.[22] But as a novel of sexual competition, the myth has a certain internal coherence.

From an economic perspective, the claim of private equity is that replacing widely dispersed public shareholders with a unified shareholder will improve shareholder supervision. But this claim can't be right. In the underlying corporation, the issue is that diversified, passive, portfolio shareholders have neither the incentives nor the capacity to monitor the actual company decisionmakers. The private equity fund—like the earlier junk bond financed, management led buyouts, and the conglomerates that preceded them—claims to eliminate this issue by replacing dispersed shareholders with a single one (or small group in the case of the MBO) that will have an incentive to supervise.

Unfortunately, the solution merely accentuates the problem. On the one hand, the supervisor is itself an institution run by professional managers, so the only real supervisory change is that an additional layer of managers has been added—outside the firm, less tied to its interests, and with di-

22. *See generally*, Daniel J.H. Greenwood, *Looting: The Puzzle of Private Equity* , 3 BROOKLYN J. CORP., FINANCIAL & COMM'L LAW 89 (2008).

minished access to the information necessary to make sound decisions. That seems unlikely to help. And on the other hand, investors remain dispersed, as of course they should be in order to maximize their risk-absorbing function. They are simply renamed as bondholders or private equity limited partners instead of shareholders and given reduced information and governance rights. To believe that this modification will reduce agency cost losses due to self-interested managers is bizarre. Adding more, less informed, and more highly paid, managers increases the managerial take, not the reverse.

From a sociological perspective the problem is even worse. The new managers are freed of all the restraints of fiduciary law and morality: they are not employees but investors. Thus, they are emotionally and legally free to take a far more exploitative view of the firm. Executives, after all, are employees who, legally, owe a fiduciary duty to the firm and, sociologically, may well feel some loyalty to their fellow team members. The new managers, in contrast, are clearly outside the firm, legally and sociologically. Shareholders owe the firm no fiduciary duties under the law and are not expected to show it any loyalty in common non-legal ethical views. If they run the firm into the ground while extracting large sums for themselves and their dispersed investors, they can go home feeling that they've done a good job, not that they have contributed to the destruction of the American way of life.

Moreover, the new managers are more likely to be trained in the arts of speculation, investing, and finance rather than managing actual people, engineering, or marketing. So we've put the tiller into the hands of people less qualified to operate it than their predecessors, thus giving up on much of the benefit of specialization of labor.

Worse still, the new managers score themselves by the sums they are able to extract from the institutions they control and from their investors, rather than, for example, by their success in building or expanding the underlying business, improving products and services, or providing good jobs for Americans. Anyone trained in the investment markets understands that investors respond, quite rationally, to appearances more than reality: a decent bubble or panic is far more powerful than any underlying fundamental information. As the common Wall Street aphorisms put it, "don't fight the tape" because "the markets can stay irrational longer than you can stay solvent." So the upshot of the private equity solution is to put control of our most important institutions into the hands of people trained in creating appearances and trading on fads, who understand that the best way to make real money in the investment markets is to move the masses in any direction while staying ahead of the wave.

In short, the private equity solution is to install an additional set of agents, with perhaps the most powerful financial incentives one could imagine to fudge or manipulate financial results, little skill at making genuine fundamental improvements, and a moral frame of reference that justifies extreme self-centeredness. It doesn't take a PhD in behavioral psychology or a heavy dose of cynicism to predict frequently unhappy results.

If economics and sociology are not supplying the justification for the legal changes that have facilitated this new organizational form (or new layer of legal extractionists leeching off the older forms), then all that is left is mythology.

The narrative of the shareholder as Lear, Noah, or Titan, needing the law's assistance to fend off the upstart managers fills the hole. Shareholders, in these narratives, are cast as the true king, the old regime, and the founding generation; managers as the revolutionary youngsters greedily trying to overthrow the old order. Usually, those who tell the story intend to call the curse of Ham upon the upstarts, leaving the status quo relatively intact, rather than accepting the inevitable victory of potency over old age, as in the myth of Titan, or condemning the entire family to doom for its violation of the natural order, as in Oedipus or Lear. The narrative, with its moralistic overtones of legitimate rule legitimately stolen or improperly usurped, nicely fits the conflict between managers—who run the company but, like the evil viziers of popular monarchist anti-monarchicalism, have explicitly renounced any claim to legitimate rule—and public shareholders—that like any ancient regime rest their claim to authority on the laurels of their predecessors' power.

C. Protecting the Widows

In contrast, securities law often reverses the gender, for a more straightforward, if less interesting narrative, in which female shareholders—widows and orphans—passively await protection and rescue.

The SEC acts as the knight in shining armor, storming the tower and vanquishing the dragon which has them in thrall. In the securities law narrative, shareholders are rarely potent owners controlling their offspring. Instead, they are passive investors, mere consumers of security paper, or marks that the real and scary men will take advantage of if given half a chance. The nanny state must step in to protect naively innocent capital from deflowering.[23] Again, the story seems at least as important as conventional legal doctrine; it was Berle and Means and the New Deal's great innovation to reverse shareholder gender and thereby provide ideological acceptability for the massive regulation that makes our freest market possible.

A similar gendering appears when, unusually, courts decide to hold shareholders responsible for the obligations of their corporate creatures.

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23. Apologies to DEAN BAKER, THE CONSERVATIVE NANNY STATE: HOW THE WEALTHY USE THE GOVERNMENT TO STAY RICH AND GET RICHER (2006).

Although you might think that a shareholder that actually exercised the mastery Oedipus's father has lost would be male, the courts instead "pierce the corporate veil," assuming the phallic role themselves and removing the hijab providing a false modesty to a too-forward female shareholder.

Here, my reason for seeing the narrative as important is straightforwardly rhetorical. We could, and sometimes do, deal with the issue as a simple matter of a Tinker Bell solution to abuse of a legal fiction. Like Tinker Bell, corporations only exist if their creators believe that they do. The courts could point out that so-called limited liability is simply a legal separation between corporation and the people affiliated with it as investors and managers: the principle is not limited liability but entity liability. The exception, then, would follow naturally. If the corporation is not in fact separate, and moreover the controlling parties don't respect the fiction of separateness (i.e., if they demonstrate that they don't believe in Tinker Bell, by treating the corporation's assets as if they were their own) then they should be estopped from claiming that they are not responsible for the firm's debts.[24]

Such an approach would largely eliminate the wooly mystifications of veils torn and unmentionables disclosed. Instead, we could focus on the real policy issues: on the one hand, making contractual risk allocations transparent so that those assuming business risk understand what they are doing and when they ought to charge for it, and on the other hand, actually debating the degree to which we wish to use the power of the state to help business entrepreneurs, shareholders, and managers expropriate potential tort victims who they expose to risk for fun and profit, without consent or compensation.

Instead, we use metaphorical veils to conceal the real policy question of when business investors should be held responsible for their actions or what pricing system a capitalist market needs for the "invisible hand" to generate attractive results. In the narrative, responsibility and market economics disappear entirely. Instead, modest corporations need to be protected from overly potent creditors; tort victims are recharacterized as sexual aggressors, and only the most promiscuous of the veiled corporate denizens of the harem can be uncovered—in a sudden reversal that seems to echo common law "bad girl" defenses to rape charges.

D. Corporate Plutocracy and the Democratic Narrative

The basic issue of corporate law as taught in the law schools and practiced in the courts is the relationship between shareholders and managers.

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24. Berkey, *supra* n. 9, follows this rhetorical model.

The stories we tell in this area are so engrained in legal thought that it is difficult even to see them.

Older narratives understood the corporation as a "body politic." Although the term—nearly universal in the early Supreme Court cases—has fallen out of use and the modern narrative of the firm as an entrepreneurial hero conflicts with this political understanding, we still acknowledge that firms are governance institutions.

Corporate law sets the rules by which we govern major institutions that are essential to our collective and individual lives. This poses a major problem, or at least it would if we looked past our narratives. We live in a democratic age, in which the sole legitimate source of political power is the consent of the governed. Yet our business corporations defy every norm of democracy.

Most fundamentally, corporate law and our major business corporations treat the people most analogous to the governed, those most concerned with corporate decisions, as mere helots. Employees in the American corporate law system have no political rights at all—not only no vote, but not even virtual representation in the boardroom legislature. Board members owe a fiduciary duty to the corporation, according to most of the statutes, and to the shareholders, according to the popular shareholder primacy narratives, but they owe no consideration at all to employees.[25] Nor do employees have the fundamental political rights of freedom of speech, rights to petition for redress of grievance without fear of retaliation, or even minimal procedural protections before metaphoric exile.[26]

Even shareholders, the sole voters in this governance structure that we call "shareholder democracy," do not have basic democratic rights. Voting

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25. Most states have statutes that explicitly permit – but do not require – boards to consider employee interests, either in general or solely in the context of hostile takeovers. See, e.g., Ohio Rev. Code §1701.59 (E) (1). Delaware reaches a similar result by its broad deference to board determinations of corporate purpose and the choice of means to achieve these goals. See, e.g., Paramount Communications, Inc. v. Time, Inc., 571A.2d 1140 (Del. 1989) (upholding board decision to pursue its chosen corporate goal despite obvious shareholder interest in proceeding otherwise). However, the law in action – popular understanding of the way that directors ought to exercise the vast discretion corporate law grants them – is quite clear that the interests of the corporation do not include its employees. Moreover, the law is clear that if directors do not consider employee interests, employees have no legal remedy.

26. The basic American rule remains agency and employment at will: employees owe fiduciary duties to their employer, but not the other way around, and employers have an absolute right to fire for any reason or no reason at all. To be sure, the civil rights acts, which bar termination for a short list of forbidden reasons, create incentives for employers to document cause for terminations, but, on the other hand, the destruction of the private sector unions has vastly shrunk the pool of employees with contractual or procedural protections. On balance, employers clearly have more ability to exile dissidents than any political entity in the free world – or even US employers of a half century ago.

is per share, not per voter or even per human-indirect-shareholder. Shares, of course, can be bought, sold, loaned, hedged, or collected into diversified pools, and in the modern practice that means that votes can be freely sold together with or separate from the underlying share or the economic interests it allegedly represents.[27] Even leaving aside the interesting issue of the actual influence share votes have in public corporations, this is no democracy. At best, it might be some form of plutocracy: voting is by and for wealth, not people.

E. Moments in the Market and Pieces of Property

When the democratic narrative wears thin, apologists tend to revert to our other legitimate governance mechanism: the market. This is just as mysteriously mythological. In a seminal article close to the beginning of the modern corporate era, Coase pointed out that firms can only exist if they are a useful *deviation* from the market.[28] Their bureaucratic command and control decisionmaking apparatus imposes costs that markets do not: actors using markets to coordinate need not pay for managers to coordinate for them. So merely duplicating market functions is not enough. If corporations cannot do something better than markets, they cannot exist.

Nonetheless, we have an oft-repeated myth in which corporations are mere contractual arrangements best understood as "moments in the market" with no other existence at all. Alchian and Demsetz went so far as to deny the existence of bosses altogether. In their view, business corporations, unlike all other bureaucracies, should not be seen as power structures at all, since the putative victim of coercion can always sever the relationship.[29] Far from being an escape from the market, in this story the hierarchal bureaucracy and unchecked internal power of the large firm is simply invisi-

27. *See generally*, Daniel J.H. Greenwood, *Fictional Shareholders,* 69 S. CAL. L. REV. 1021 (1996) for an overview of the narratives we tell about shareholders compared to the reality of the interests and likely behavior of investment pools and their managers. For specific discussion of the many devices available for deconstructing shares into their component parts, including separating the right to vote from any interest in the well-being of the firm, see the *Empty Voting* series of articles by Black and Hu, 79 S. Cal. L. Rev. 811 (2006); 156 U. Pa. L. Rev. 625 (2008).

28. R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA, New Series 386, 390–91 (1937), reprinted in RONALD COASE, THE FIRM, THE MARKET AND THE LAW (1988).

29. Armen A. Alchian and Harold Demsetz, *Production, Information Cost, and Economic Organization*, 62 AM. ECON. REV. 777, 777-8 (1972) ("The firm has no power of fiat, no disciplinary action any different in the slightest degree from ordinary market contracting between any two people"). Locke, of course, used the same "tacit consent" argument to contend that every landowner, or perhaps inhabitant, who does not emigrate has accepted the legitimacy of the law. LOCKE, SECOND TREATISE ON GOVERNMENT (ch VIII, §119). Cf., PLATO, CRITO 51-53(standard pagination).

ble, no more coercive than was the Lochner bakers' freedom to work more than sixty hours.[30]

While the "moments in the market" and "nexus of contracts" narratives tend to make firms dissolve into mush, lawyers and other narrators of the corporation routinely slip into a different story, in which the firm solidifies into property. Defying our abolition of slavery, the corporation is portrayed as a thing—neither a state-like governance structure nor a market-like nexus of contracts, but a piece of property owned by its shareholders. Mixing the metaphors yet further, the ownership theory is often combined with one in which directors are—contrary to every available legal authority—agents for the shareholder-owners. One might think that, at least for lawyers, this story would create impossible cognitive dissonance: after all, if directors were agents of the shareholders or if shareholders were the owners of corporate property, ordinary principles of law and morality would require that shareholders be responsible for corporate debts, thus defeating entity liability. But this narrative functions to teach directors and managers that they ought to act in shareholder interests even when law, market, and ordinary capitalist self-interest suggest otherwise.[31]

F. Narratives of Predestination and Justification by Works, Bell Curves, and Chaos

Beyond the narrower confines of corporate law, we do not debate the controversies of political economy based on clear models or experimental or experiential data. Instead, the most powerful locus of the debate (other than the ever-present power of money and the repetition, hence respectability, it can buy) is our mythology of the nature of the world.

One side of the debate proceeds by means of Social Darwinist stories in which success is a marker of goodness, and the "free market"—usually meaning a market highly regulated to assure that the haves-not-too-much behave according to norms that do not bind the upper class—comes with a divine guarantee that all that is, must be the best that is possible, in this best, or at least inevitable, of all possible worlds. In this mythology, the virtuous do their best within the rules that are handed to them from On High, and only the most sinful of evildoers dare, Abraham-like, to question the justice of the Sacred-Market-Dispenser-Of-All-Justice.[32]

Against the Social Darwinists are newer and older myths in which people have collective agency, some possibility of control over their lives or at least the ability to speak out against what they know is wrong.

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30. Lochner v. New York, supra n. 15.
31. See infra at n. 55.
32. Gen. 18:25 ("Could the Judge of all the earth not do justice?").

Parallel to these morally infused stories are mathematical narratives about how the world works. The latter-day Social Darwinists generally tell stories based on bell-curves, normal probabilities, and simple oscillating systems returning to stasis. The market, it seems, is best understood as a pendulum, shocked from time to time by new inventions or foreign wars, but returning quickly and predictably, using high-school math, to the stationary hanging point. And even if the math gets intractable for lawyers and laymen, it doesn't much matter: you don't need to know the details to know where the pendulum is going to end up when the external force stops pushing it.[33] Markets are efficient, and that means that they quickly and predictably reach the best possible result; if it looks unjust or just wasteful, that is simply because the looker is not looking in the right way.

In sharp contrast, more (post)modern and more humble social theories increasingly turn to the math of chaotic systems and recursive, self-referential networks, in which simple drives plus minor perturbations lead to easily explicable but never predictable results.[34] These models have the advantage of reflecting, rather than abstracting from, the necessarily social nature of human society; unlike the pendulum models they need not assume that human beings are autonomous monads acting without reference to others.

They can, that is, incorporate Veblen's basic insight that in any reasonably affluent society nearly all important goods are positional.[35] By and

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33. This model pervades all of corporate finance, particularly the simplified version taught in basic law and business school courses, and underpins most of the "law and economics" political critique of regulation. *See, e.g.*, JEAN TIROLE, THE THEORY OF CORPORATE FINANCE (2006), fig 1.1 and throughout (assuming bell-curved probabilities of returns); KLEIN & COFFEE, BUSINESS ORGANIZATIONS AND FINANCE (10th ed. 2007). If the pendulum is inevitably and quickly going to end up pointing downward, what's the point of wasting time and energy trying to get it to do something else? (It may not be accidental that this particular story gained political traction at just about the same time that people stopped having regular personal experience with pendulum powered clocks: as a matter of practical reality, moving pendulums are far more useful than stationary ones even if one does need to interfere with inevitable returns to equilibrium by winding the clock. More puzzling is why observers so rarely remark on its the obvious ideological family resemblance to old-style Marxist-Leninism, with its similar assurances of inevitability.)

34. *See generally*, JAMES GLEICK, CHAOS (1988).

35. THORNSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS 26, 32 (1912). For a wonderful modern restatement and expansion, see ROBERT H. FRANK, FALLING BEHIND: HOW RISING INEQUALITY HARMS THE MIDDLE CLASS 91-2 (2007) (discussing why male moose have impractically big antlers: interpersonal competition, which demands larger antlers than the other guy, is a stronger evolutionary pressure than simply being able to move around the forest). Hobbes, of course, made the same point about power, which he viewed as the second primary goal of men, after staying alive. See HOBBES, LEVIATHAN, *supra* n. 19, chs. VI, XIII. When goods are positional, absolute amounts are far less important than relative standing: more wealth only does me some good if I have enough to appropriate necessarily scarce goods, which, in turn, will be the only ones conveying respectability (for the middle class) or fabulousness (for Veblen's leisure class or the modern robber barons).

large, once our bellies are reasonably full, we are more interested in each other than in stuff for stuff's sake.[36] So, Veblen emphasizes, most material goods and services are valued not for their own sake but because they signal or affect our status relative to others. Sometimes, Veblen says, this is because the good itself is simply a status signal: it shows that the possessor has more money or more time or more prestige or more strength or more virility than other people. When pale untanned skin indicated that its possessor did not have to work in the fields, it was a sign of beauty; but once being out in the sun became a sign of leisure, the definition of beauty reversed. Sometimes, it is because the good itself is scarce or the skill is difficult to acquire, and so possession or mastery indicates relative wealth or leisure. This structure means that most important goods function on a curve, like law school grades. Absolute amounts are irrelevant. Only relative standing matters.

Consequently, people rarely have desires independent of each other or act without considering each other. This means, in turn, that small changes in initial conditions are likely to have grossly disproportional consequences, that stability is likely to be exceptional rather than normal, and that—quite contrary to Spencer and his followers—success or failure may be entirely independent of the merits.[37] If Alphonse is coordinating with Gaston and Gaston is coordinating with Alphonse, there is no guarantee that the best man will win, or that they will reach an efficient or predictable solution, or, if there are enough Alphonses and Gastons, any solution at all. Unfortunately, it also means the end of the simple law-and-economics influenced answers to every question that generated so many identical scholarly articles.

II. PUTTING THE NARRATIVES TO WORK

To fully explore each of the stories would be beyond the scope of this essay. But I think I can say something interesting and brief about two. I leave as an exercise for the reader finding language in the cases that reflects and furthers the remaining narratives and judging whether alternative explanations—internal legal logic, moral imperatives, raw power politics, or random ideological drift—are sufficiently strong to negate the inference that we debate by telling stories, and that the stories we tell influence the decisions our judges and politicians make.

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36. In this we resemble our primate relatives. See, e.g., ROBERT M. SAPOLSKY, PRIMATE'S MEMOIR (describing baboon life as consisting of small bouts of eating interspersed among large stretches of social interaction, mainly "driving each other crazy"),

37. *See, e.g.*, MALCOM GLADWELL, THE TIPPING POINT 8 (2000).

A. Stories of Corporate "Personhood": the Firm as Clint Eastwood

I began by claiming that the story of the corporation as "heroic individual standing up the force of the government on behalf of progress" underpins virtually all Supreme Court jurisprudence on the subject of corporate rights since *Santa Clara*.[38] In this narrative, the corporation itself becomes a man, endowed like real boys with unalienable rights of life, liberty, the pursuit of property, and the purchase of governmental favors, although without Pinocchio's adventures or redemptive discovery of fellow-feeling and caring. Simultaneously if not consistently, the older vision of corporations pokes through. So sometimes the narrative of the corporation switches to "democratic sovereign pursuing the democratic will of its shareholder citizens."

In each case, however, the picture agrees that the corporation is firm: it has the unified will of a pre-Freudian pursuer of Benthamite personal interests. The corporation—presented in both versions without any discussion or, usually, even acknowledgment of its internal processes—is strikingly untouched by angst, post-modern-indeterminacy or identity troubles, or even conflicts of interest among its various constituencies. Real people, as we've known at least since Augustine, are often torn in their impulses and neurotic in their solutions to internal contradictions. Modern biology has begun to push the unpredictability of emergent network behavior, like William James' turtles, all the way down. Even in corporate theory, nexus of contract proponents attempted to deconstruct the firm, replacing its comforting unity with a mere moment in the market. This narrative of corporations,

38. Santa Clara County v. Southern Pacific RR, 118 U.S. 394 (1886). Santa Clara, of course, was only possible because the understanding of corporations as individual heroic entrepreneurs furthering progress was well established earlier. *See, e.g.*, Morton Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1986). Indeed, the one constant in the early Supreme Court's weaving among "aggregate," "artificial entity" and "natural entity" theories of the corporation is that in every iteration, the Court sees its role as protecting helpless corporate heroes to resist the illegitimate forces of state populism, whether by limiting state regulatory authority under the Contract clause (Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819)) or, later, the due process clause (Santa Clara, Lochner), or by consistently protecting corporate access to Federal courts under wildly inconsistent theories. *Compare* the "corporation is 'really' its 'members'" theory of Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809) *with* the precisely contrary theory, adopted when the Deveaux theory would have denied diversity to a significant number of corporations, of Louisville RR v. Letson, 43 US 497, 554, 557 (1844) (corporation is deemed a citizen, for diversity, of state in which it is incorporated regardless of citizenship of its 'members'). *But see* Paul v. State of Virginia, 75 U.S. 168 (1868) (holding that corporation is not a citizen for purposes of privileges and immunities clause). Modern business corporations do not have "members," but Letson remains the reigning explanation of why business corporations are allowed to invoke diversity jurisdiction despite the clear language of the Constitution, Article III, Section 2.

however, is stuck in a world of Cartesian clocks, in which single causes lead to predetermined and inevitable results.

From a doctrinal perspective, the simplification is both wonderful and essential to avoid the standard eighteenth century liberal critique. Hobbes saw the state as a voluntary association to promote the interests of its members—a form of corporation. The image has stuck through the various peregrinations of social contract theory, including our own Declaration of Independence and the Preamble to our Constitution, with its assertion that "We the People . . . do ordain and establish" the government for our own benefit.

For anyone steeped in social contract theory, the reverse must be true as well: business corporations look remarkably like the state.[39] Social-contract states and corporations alike are formed by individuals for their own ends, but the institutions and their leaders are necessarily granted enough power to thwart those ends as well as fulfill them.

The great project of liberal political theory—taming this instrumental state through restricted goals, individual rights and, later, democratic voting—is meant to make the state and its leaders into public servants instead of masters. Every bit of the critique applies trivially to our great business corporations. They too are run by rulers who threaten to become our masters rather than our servants. They too are essential for modern civilized life, yet powerful enough to overpower us, always threatening to adopt goals of their own, best controlled by restriction to narrow and confined areas of our life.

If the corporation is a governance structure like usual liberal or social contract governments, we should worry about checks and balances to help ensure that the institution promotes our common welfare and collective freedom without unduly interfering with individual liberty. But if the firm were a unified whole, none of this would matter.

If we imagine corporations as having a single will, we need not worry about the threat of Hobbesian civil war or Lockean collective overreaching. Instead of recognizing it as presenting the same benefits and dangers as government, the story makes the firm look like a pre-Freudian, pre-Augustinian, unconflicted autonomous will. The corporation, in this narrative, becomes a citizen, not a government.

Logically and historically, the liberal tradition of suspicion of absolute government, and the social contract tradition of desacralized government and deriving its legitimacy from its usefulness, ought to have led to deep suspicion of corporations as well. In popular culture, that suspicion is not

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39. HOBBES, LEVIATHAN, *supra* n. 19, ch. XVII (describing commonwealth as "artificial ... covenant"); THOMAS HOBBES, ELEMENTS OF THE LAW, bk 2, ch 8, para 7 (analogizing body politic to corporation). Cf. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE ("Nations themselves are such corporations").

hard to find. However, since the mid-nineteenth century, the United States Supreme Court has consistently placed the business corporation resolutely on the private side of the great liberal divide between state and subject, treating corporations as in need of protection from government rather than as government from which we need to be protected. The narrative of corporations as individuals gives this jurisprudence some literary coherence—even if it remains politically, ethically and democratically repulsive.

Business corporations are creations of people and our laws, not the "Laws of Nature and Nature's God."[40] Their very human creators can endow them with no natural rights. The same logic that leads us to fear the state—the potential for misuse of its massed Hobbesian power against relatively powerless and unorganized individuals—should lead any student of liberal political theory to fear massive bureaucratic organizations with extraordinary power over our daily lives. Structure, political theory, and policy all suggest that public corporations, like municipal corporations, should be on the public side of the public–private divide. Still, in the first story, corporations are firmly on the private side of the great public–private divide that permeates liberal ideology and American law.[41] This is not a matter of legal logic political theory: both logic and theory suggest the reverse result.

History points in the public direction. Historically, corporate status—the right of a group of individuals to assert a collective right—was associated with state or state-like status. Thus, in medieval Europe, the Church, the Universities, incorporated cities, the Jews, the Knights of Malta, and the aristocracy each had the external right (or obligation) of being treated as an undifferentiated whole by the state. The privileged corporations of aristocracy and church, for this, reason, had the right to vote separately in the Parlements; the less-privileged Jews were subject to collective taxation and, often, collective punishment. In each case, the state recognized the corporations as collective bodies entitled to at least some of the rights of a fellow (if not equal) sovereign. Internally, the picture was similar: corporations were characterized by internal rights of lawmaking, taxation, self-government and administration of justice, collective representation to the state, and so on.

Early business corporations, developing from this historical background, often shared both commercial and governmental characteristics. So, for example, trading companies like the Virginia Company, the Massachusetts Bay Company, the Hudson Bay Company, and most famously, the East India Company actually governed Virginia, Massachusetts, Canada, and India respectively, for varying periods and with varying degrees of rapacity.

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40. Declaration of Independence.
41. *See, e.g.*, Civil Rights Cases (1883) (state action doctrine).

Even beyond the imperialist trading companies, courts routinely described corporations—even banks, universities and insurance companies—as "bodies politic" well into the nineteenth century. As the term implies, they understood the most fundamental aspect of corporate status to be the right to legislate binding rules upon the membership: a majority could bind the minority without its consent, contrary to the ordinary rules of contract and partnership.[42] Until the general incorporation laws of the mid-nineteenth century it was generally assumed that corporations could only be formed for quasi-governmental tasks with a strong public interest, such as banking, university and secondary education, or transportation (bridges, canals, railroads). Indeed, well into the second half of the nineteenth century the standard corporate law hornbooks treat municipalities as the paradigm of corporate law. The corporation was characterized by its rights of internal lawmaking and thus especially suitable for cities; business corporations were simply a special application of the more general model of self-governing, lawmaking, sub-governmental bodies. In short, the history of the business corporation is the history of a quasi-sovereign body politic endowed by the state with rights that were understood to be permanent grants.[43] This is a public history—it is not the origins of the corporate form that drive the Court to assimilate it to citizen rather than state.

Logically as well, modern business corporations remain creatures of the state, endowed by legislation with extraordinary powers that amount to recognition as a quasi-sovereign. They are state-like in the most fundamental sense that they are collectives, not individuals. As governance structures creating rules for the people who compose them (and others affected by them), and much like other state agencies, they aggregate individual efforts into something larger and more powerful. They act by bureaucratic decisions that can never fully reflect the will or interests of those who are affected by them (and, indeed, under current law, do not even attempt to do so). Like states, they exist in large part to plan and control the vagaries of

42. *Supra* n. 8. Cf. Bank of Augusta v. Earle, 38 U.S. 519, 578 (1839) (argument of counsel) ("Corporations are neither persons nor partners, but artificial bodies politic, created by act of state, always ad hoc, and their franchises are granted for public good"). This body politic language, which appears in virtually all the early corporate cases, fades after the Civil War. Compare, Ohio & M.R. Co. v. Wheeler, 66 U.S. 286, 295 (1861) (describing corporation as a "body politic") with Paul v. State of Virginia, 75 U.S. (8 Wall) 168, 177 (1869) (contrasting the corporate "person" (seen as an individual) with citizens who are members of the body politic of Virginia). The modern sense that the critical characteristic of the corporation is its economic segregation of corporate assets from personal assets could not develop until entity liability was universally accepted – and as late as the Great Depression some states routinely held shareholders liable for corporate debts under various conditions. New York still has one such provision. NYBCL § 630 (holding certain large shareholders of non-publicly traded corporations personally liable for unpaid corporate wages).

43. Dartmouth College (*supra* n.36) is the last example in the US Supreme Court of this typically medieval view.

nature and markets. Like states, they are necessary to our happiness, yet also menaces to it; the same power that we rely on threatens us. Perhaps this is why we tell inverted social-contract stories about states and corporations: we pretend that our government was formed by an agreement of its citizens in order to emphasize that decent governments treat their citizens as their end and goal. Conversely, we pretend that corporations result from private contracts in order to legitimize (as a result of purported "agreement") the disenfranchisement of most corporate participants and to hide corporate power.[44]

Corporations exist only because the state delegates extraordinary power to them. In particular, it treats each corporation as "corporate" in the simplest sense: as a single entity under the law, regardless of the number of people who compose it, their disagreements among themselves, or their struggles over the courses the entity will take. Obviously, this unity is a fiction; in the post-Freudian world, even ignoring the discoveries of modern neurobiology, it'd be hard to take seriously a claim that even a single individual is a unified whole, let alone a mass of office politics and market pressures.

The narrative of unity, moreover, hides the full extent to which corporate law changes otherwise well understood features of the legal landscape. Because the law views the corporation itself as a single legal actor, joint action that would otherwise be clearly in the realm of conspiracy, monopoly, rebellion, or restraint of trade simply disappears. Thus, even after a century of struggle, unions still must confront intense judicial hostility to joint action—while joint action by capital within a corporation is not even arguably conspiracy in restraint of trade or monopoly. Similarly, the fact that the entity alone is considered legally responsible for its contracts, torts, crimes, and taxes and it, not its affiliated citizens, is owner of its property, means that citizens can evade ordinary regulatory law by creating undercapitalized corporations. And while our law gives corporate decisionmakers broad and largely unreviewable power to determine the working conditions and rights of those employed by it, invested in it, or bound by its decisions, the narrative of corporate unity makes that power scarcely visible. It looks like we are giving autonomy to the corporation itself, not handing authority to its undemocratic and authoritarian power structure.

The legal fiction of unity borrows from and follows the precisely parallel rules with respect to states, foreign and domestic. This story of corporations as unified sovereigns underlies much of corporate law. The corporation itself, not the citizens who work for or are otherwise affiliated with it, is endowed by the state with decisionmaking power, both internally and externally. Moreover, much as comity doctrine assures that US courts recognize

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44. *See supra* text accompanying notes 31-35.

foreign sovereigns regardless of how badly dictatorships defy our theories of political legitimacy, our corporate law recognizes and reinforces the internal power of the corporate authority it creates. State law recognizes the internal authority of corporate power structure regardless of local law—the corporation, like a foreign state, is permitted (under the Internal Affairs Doctrine) to adopt the law it sees fit. Unsurprisingly, perhaps, corporations do not choose law that reflects American constitutional norms of limited government. Instead, Delaware corporate law is broadly permissive, allowing the corporation's power holders virtually unfettered control over virtually every aspect of corporate power.

Modern business corporations are, along with governmental agencies, the most important organizations governing our lives.[45] Multinational and publicly traded business corporations and governmental agencies alike are arenas where planning and bureaucratic decisionmaking supplant, or at least hold at bay, markets, institutions that control (especially internally) by rule making rather than price, influencing the rules of the market as much as they respond to it. And, of course, our major corporations are increasingly important sources of the most-traditional government services: they provide essential goods and services without which we cannot survive,[46] control the overwhelming bulk of security[47] (including, for the first time since the heyday of the East India Company overseas violence),[48] run prisons,[49] advise

45. See discussion in *Markets and Democracy,* supra n. 23*,* text accompany nn.56-62.

46. Thus, for example, California's failed 'deregulation' of the electric market allowed Enron to replace the former regulatory agencies as the primary institution setting electric prices. See, e.g., Jacqueline Lang Weaver, *Can Energy Markets Be Trusted*, 4 HOUS. BUS. & TAX L. J. 1**,** 20-22 (describing Enron's dominance of markets for 800 commodities). The Congress has long worked with international agri-business to set food prices through an elaborate system of subsidies and import controls; it is anyone's guess which institution is more in control of the process. cf., PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (arguing that while First Amendment does not grant speech rights against shopping mall, state may decide that such rights are necessary or important to a viable political debate). For a satirical and not necessarily accurate view of the effects of privatizing formerly governmental tasks, *see* the musical URINETOWN: THE MUSICAL.

47. *See* Ian Patrick McGinley, *Regulating "Rent-A-Cops" Post-9/11: Why the Private Security Officer Employment Authorization Act Fails to Address Homeland Security Concerns*, 6 Cardozo Pub. L. Pol'y & Ethics J. 129, 129, 156 (2007) (stating that private security forces outnumber public ones by three to one); Daniel JH Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 IOWA L. REV. 995, n.31 (1998) (citing sources on relative size of public and private security forces).

48. Bill Keller, Essential, They Say, But 'Repugnant', N.Y. Times, Jan. 20, 1986, at A24 (labeling proposal to use private contractors in military conflicts "radical"); James Risen & Mark Mazzetti, *Blackwater Guards Tied To Secret Raids by C.I.A.*, N.Y. TIMES, Dec. 11, 2009, at A1 ("[F]ormer Blackwater guards said that their involvement in the operations became so routine that the lines supposedly dividing the Central Intelligence Agency, the military and Blackwater became blurred."); Dexter Filkins & Mark Mazzetti, *Contractors Tied to Effort to Track and Kill Militants,* N.Y. TIMES, March 14 , 2010 (describing use of private

other government agencies on regulations and often write them directly (not only as lobbyists but even explicitly in "self-regulating" industries),[50] maintain files on our behavior that once would have been the province of the secret police,[51] and so on.

To be sure, business corporations have lost some of the explicitly governmental character of the early corporations—no one today would think to decree that the governor of a state would forever be an ex officio member of a corporate board, as Massachusetts did in chartering Harvard; we have abandoned the impractical practice of requiring separate legislation for each derogation of sovereign power to a new firm, and courts no longer police the "public purpose" of our business entities. But this is mainly a question of independence rather than sovereignty—just at the Federal government has grown more independent of the states (state legislatures no longer appoint senators or the electoral college) without becoming any less govern-

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contractors to kill, possibly in order to evade normal Congressional oversight) http://www.nytimes.com/2010/03/15/world/asia/15contractors.html; James Kraska & Brian Wilson, *The Pirates Of The Gulf Of Aden: The Coalition is the Strategy*, 45 STAN. J. INT'L L. 243, 263 (2009) (describing Blackwater's role in policing piracy).

49. *See*, *e.g.*, *Correctional Partnerships: A Secure, Efficient, Flexible Option for Government -A report by The CCA Research Institute* available at http://www.partnershipprisons.com/reports/ (Private prison company advertising its services); William J. Sabol, Ph.D., Todd D. Minton, and Paige M. Harrison, *Prison and Jail Inmates at Midyear 2006*, U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS - BUREAU OF JUSTICE STATISTICS BULLETIN (June 2007, NCJ 217675) available at http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim06.pdf (Bureau of Prisons report stating that as of June 2006, 102,000 Americans were held in private prisons, including 14.2% of all Federal prisoners).

50. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965) (describing processes of regulatory capture and why private interests are likely to overcome public good); George Stigler, *The Theory of Economic Regulation,* BELL J. ECON. MAN. SCI. 2:3-21 (1971) (describing regulatory capture). Sometimes, of course, capture is part of the regulatory design. Thus, the primary regulator of the stock exchanges is the stock exchanges themselves, which are classified as "self-regulatory organizations" pursuant to '34 Act, Section 6. Similarly, the Federal Open Market Committee is staffed, by law, with representatives of the very banks it regulates. See, 12 U.S.C. § 263(a).

51. *See, e.g.*, IMS Health Inc. v. Sorrell, 631 F.Supp.2d 434, 441-2 (D.Vt.,2009) (describing data mining by pharmaceutical companies to identify marketing prospects); Charles Duhigg, What Does Your Credit Card Company Know About You? NY Times Magazine (5/17/09), available at http://www.nytimes.com/2009/05/17/magazine/17credit-t.html; Microsoft Online Services Global Criminal Compliance Handbook (March 2008) (detailing personal information Microsoft stores and can produce regarding its customers, including complete email files, passwords, internet access records, entire contents of Office Live "cloud" workspace and storage service, etc), available at http://file.wikileaks.org/files/microsoft-spy.pdf.

mental, so too, corporations have only taken on more power as they have become more independent.[52]

The logic of traditional social-contract-based liberalism, in both its center-left and center-right versions, suggests that these massive sources of collective power—far wealthier and far more able to negatively affect our individual lives than virtually any local government or even most Federal agencies—should be just as scary as government.[53] For most people, their employer has power over them that vastly dwarfs that of the local municipality or the Parks Department. If Hobbes' Leviathan was a corporate body composed of the subjects of the state yet existing apart from it, then our modern corporations are surely subject to the same critiques as the Leviathan itself.[54]

Our metaphors, however, stress the difference between state bureaucracy and business corporation bureaucracy. We might have seen multinational corporations as especially fearsome versions of Leviathan—feudal or colonial powers with sources of coercive power independent from the state and the local population yet lacking even a sense of *noblesse oblige* or honor to tame their potentially exploitative attitude towards their host populations; rootless cosmopolitans able to jump national boundaries at a single bound, only minimally responsive to ordinary politics; and selfish maximizers of institutional interests with neither religion nor social ties to limit their exploitation of the material underpinnings of our economy and ecosystems. Our predecessors flirted with such images, with Burke describing the East India Company as the greatest corrupter in history and Adam Smith opining that no corporation could ever be an efficient producer. We, instead, view corporations through a glass, darkly, of very different stories.

In our most popular stories, corporations are said to be persons, private individuals that are more likely to be victims of power than sources of it. The corporation itself becomes a man, endowed by God with inalienable rights of life, liberty, the pursuit of property, and the purchase of governmental favors. The metaphor of individuality alone is powerful enough to establish that the Constitution must protect corporations against us, rather than us against them. Thus, each of the many cases in which the Supreme Court has assumed, without explanation, that corporations are entitled to the rights of citizens but not obligated by the norms constraining government, reiterates and reemphasizes this basic story of the public corporation.[55] In

52. In the original Constitution, states also appointed Senators and, via the Electoral College, the President. Modern political theory is far more comfortable with the notion of multiple, independent sovereigns than were the eighteenth century Founders.

53. For further discussion, see text accompanying notes 29-36; Greenwood, *supra* note 47, at n.52.

54. *See generally*, HOBBES, LEVIATHAN, *supra*, n. 19.

55. See cases and citations in Greenwood, *supra* note 47, at nn.27, 44-47.

the story, it is a rights-bearing individual in need of protection from the collective power of the bureaucratic state—not, as contractarian political theory might more obviously suggest, a state-like governing agency from which we need protection.

As we have seen, our metaphors of corporations as individuals overcome constitutional theory, history, and logic. Constitutional text fares no better: it too points towards a public conception of bureaucratized, institutionalized, business corporations. The Constitution never mentions corporations, and the language of both the Bill of Rights and the Civil War amendments does not readily accommodate rights for corporations against the citizenry. Nor does any policy based argument founded in contractarian political philosophy, liberalism broadly understood, civic republicanism, justice as fairness, the New Deal consensus, market supremacy, Adam Smith, or Hayekian regulatory minimalism or economic efficiency. Each of those theories is generally suspicious of the ability of large organizations to adequately represent individuals and should, therefore, be more inclined to see publicly traded business corporations as threats to freedom than as oppressed minorities or isolated citizens needing special protection from the ordinary workings of government.

Nonetheless, and with little attempt at justification, the Court has consistently placed corporations on the private side of the great liberal divide between state and subject, government and governed. Indeed, operating without any textual basis whatsoever, it has given them more rights than real citizens: corporations, unlike real human beings, are allowed to choose their personal law—the constitutive law that determines the internal dynamics of the entity and which of its assets are available to creditors, taxing and regulatory authorities, and its own constituents—largely without interference from ordinary doctrines of choice of law or state sovereignty.[56]

Corporations, to be sure, are not citizens, and the Constitution restricts diversity jurisdiction to citizens, but the Supreme Court quickly determined that the text was not binding.[57] Similarly, after the Fourteenth Amendment

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56. Daniel JH Greenwood, *The Mysterious Race to the Top/Bottom*, 23 YALE LAW AND POLICY REVIEW 381 (2005).

57. *See*, Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 90-92 (1809) (allowing corporations to assert diversity jurisdiction notwithstanding language of Article III Section 2, which restricts it to disputes between "Citizens of different states," on ground that "members" of the corporation were citizens); Louisville, C. & C.R. Co. v. Letson, 43 U.S. (2 How.) 497, 558 (1844) (overruling *Deveaux* and allowing corporation to assert diversity jurisdiction as if it were a citizen of the state in which it is incorporated, even if "members" were not diverse); Marshall v. Baltimore & Ohio R. Co., 57 U.S. (16 How.) 314 (1854) (overruling *Letson* and declaring that corporation is entitled to diversity jurisdiction on entirely fictional presumption that its shareholders are citizens of state of incorporation, even if demonstrably false); Carden v. Arkoma Associates, 494 U.S. 185, 189 (1990) (reaffirming Marshall fiction). Although the rationale has varied, the result has been uniform: notwithstanding the clear language of the Constitution, corporations have at least the diversity juris-

granted due process and equal protection rights to persons born or naturalized in the United States, the Supreme Court did not even need to hear argument in order to know that business corporations—but not municipal corporations—were included as well.[58] The unexplained reasoning cannot be based on the words of the Amendment. To be sure, "persons" often means "legally recognized actors" in legal jargon: for example, only sovereign states are "legal persons" in conventional international law; minors are not "legal persons" for most purposes of contract law and family law, and, of course, corporations, trusts, and other legal entities may be "legal persons" in tort, contract, property, criminal, and sometimes even tax law.[59] However, in the immediate context, the obvious plain meaning of the word is "human beings." In ordinary English usage, only human beings, not legal entities or organizations, are "born or naturalized" (Section 1). Moreover, no one has ever seriously suggested that corporations be included among the "persons" whose numbers determine apportionment pursuant to Section 2 of the Fourteenth Amendment. Thus, to read the Amendment as granting rights to business corporations (but not municipal corporations) the Court must assume that the meaning of the word "persons" changes three times in as many sentences: first meaning "human," then meaning "business corporations but not municipal corporations," and then reverting to "humans." This interpretation is not driven by the plain meaning of the text. Instead, it can only be based on the simple narrative of corporations as individuals, standing up like John Peter Zenger or Dirty Harry, for freedom against the power of the state.

By metaphor, not argument, the Court has granted corporations natural and constitutional rights to equal protection, due process, freedom of speech, privacy and freedom from the prying eyes of real citizens, and autonomy of action that cannot be limited by democratic processes.[60] It re-

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diction rights of citizens. (More, actually, since it is far easier for a corporation to select its state of incorporation than for a citizen to actually physically change residence). No argument has been offered for this result, other than the obviously illogical claim in *Deveaux* that a firm is no different than its shareholders taken as individuals and the clearly metaphorical image of the corporation as an individual in the later cases.

58. Santa Clara County v. Southern Pacific RR, 118 U.S. 394, 396 (1886) ("The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.").

59. Modern income tax law, however, allows corporations with no publicly traded securities to opt for "pass through" taxation – that is, to have the law treat the corporation as if it did not exist, imputing its income to its shareholder. Thus, modern corporations may be persons for contract and property purposes while opting for non-personhood for income tax purposes, see, Treas. Reg. §§ 301.7701-2, 301.7701-3 and 301.7701-4.

60. *See, e.g.*, Daniel JH Greenwood, *Essential Speech*, supra n. 52, at , fn 44 and passim (1998) (discussing corporate speech and listing constitutional rights of corporation

mains to be seen whether the Court will extend its new Second Amendment jurisprudence to grant corporations a protected right to take up arms against the citizenry, but little in the existing precedents suggests any reason to expect the Court to hesitate.

Today, the legal logic is far more attenuated than at the time of *Santa Clara*. The laws that define the modern business corporation did not emerge in recognizable form until the radical emasculation of the old restrictions on corporate power by the "traitor state" in 1896[61]—long after the relevant Constitutional provisions were written. A judicially conservative court respectful of the either the rights of the people to govern themselves or the rights of the states to control their own economies and their own creatures, or suspicious of organized power superseding markets, might easily have concluded that the Constitution is simply silent on the subject of corporate rights. After all, it is.

But the story triumphed over the text, history, and political theory. The Court has repeatedly justified granting corporations rights against citizens and their legislatures by analogizing the firm to an individual. Sometimes, the effort is transparently obscene—as when Justice Black contended that corporate-owned lunch counters had a constitutionally protected interest in discriminating against African–American would-be customers because of a "property owner's right to choose his (sic) social or business associates."[62] Sometimes it is simply at odds with ordinary liberal principles, as when the court extended the personal rights of the Fourth and Fifth Amendments to business corporations without any discussion of why these collective governance organizations need rights to conceal their workings from public view when our presumption is that functionally identical state agencies would not.

Most importantly, the Court has repeatedly extended First Amendment speech rights, and especially rights to fund campaigns, without any intelligible account of why a republican constitution would allow organizations created for limited economic purposes to interfere in the very political process that determines their purposes.[63] Republican and democratic gov-

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granted based on analogy to individual human being); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 4 HASTINGS L.J. 577 (1990) (detailing the various constitutional rights the Supreme Court has granted to corporations).

61. Lincoln Steffens, New Jersey: A Traitor State, 25 MCCLURE'S MAGAZINE 42 (May 1905).

62. Bell v. State of Maryland, 378 U.S. 226, 343 (1964) (Black, J., dissenting for three justices).

63. In the seminal case, the Court purported to hold that the right belonged to the speech itself—that money spent to publicize speech is always protected without regard to the values the First Amendment is meant to promote. It then carved out a limited exception for explicit quid pro quo corruption—but utterly failed to give any account of how giving removing restraints on an organization would increase the freedom of anyone other than the

ernment requires that the people maintain control over their creatures. Corporations have won constitutional rights by portraying themselves as the people, not the creatures that they are, by telling a story in which bureaucratic, market-driven and fiduciary decisionmaking disappear, along with all their well-known problems. Instead, the giant multinational firm is simply another person with a right to its opinions and to spend its money, just like you or me.

B. Stories of Shareholder Entitlement: the Stockmarket as Entrepreneur

If the first story seems to explain the Supreme Court's constitutional jurisprudence better than text, history, doctrine, and structure of theory, a smaller second story, more of a metaphor than a full-blown narrative, is critical for maintaining the financial markets which make our large corporations possible. Our public stockmarkets exist only because of a narrative we might call faith-based investing. In a world of rational-actor investors and corporate law as it actually exists, the markets would fail: shareholders would expect no dividends and therefore would be unwilling to pay for stock.[64]

Standard pricing theory makes public stock markets deeply implausible. Shareholders have no legal right to compel dividends. Worse yet, since Modigliani and Miller's seminal article half a century ago,[65] professional investors have generally accepted that a dividend deferred is equivalent to a dividend received, so shareholders should be satisfied with promises of future dividends. But a firm that defers dividend payment to a later date always has a competitive advantage over firms paying current divi-

organization's fiduciaries. The dissent followed the Berle and Means storyline by assuming, contrary to basic corporate law, economics and sociology, that corporate money spent on lobbying or electioneering belongs to the firm's shareholders and thus that the shareholders are the only parties with a complaint if the firm chooses to spend its money trying to influence the rules of the market instead of competing within them. *See generally*, First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978), discussed in more detail in Greenwood, supra note 47, text accompanying n.43. *Cf.* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 670 (1990) (Brennan, J) (stating, apparently without irony but contrary to all corporate law, that corporate money is shareholder money).

64. I've discussed this problem at greater length in *The Dividend Problem: Are Shareholders Entitled to the Residual, or Faith Based Investing: Why Economics Can't Explain Shareholder Returns*, 32 JOURNAL OF CORPORATION LAW 103 (2006).

65. Franco Modigliani and Merton Miller, *The Cost of Capital, Corporation Finance and the Theory of Investment*, 48 (3) AMERICAN ECONOMIC REVIEW 261 (1958) (extending Fischer Separation Theorem to maintain that the value of a company's securities is independent of its leverage, because portfolio investors can duplicate any desired leverage or dividend payout at the portfolio level at minimal cost). The application to dividends is referred to as the Fischer Separation Theorem, see IRVING FISCHER, THE THEORY OF INTEREST (1930), sec. II.vi, but it was not generally accepted in the investment community until after Modigliani and Miller.

dends; if product markets are competitive, corporations that pay dividends will be crushed by those that merely promise them in the future. The upshot ought to be that the promise of dividends should be like the Red Queen's offer to Alice: tea every other day, like dividends later, means tea yesterday and tea tomorrow but never tea today. Existing shareholders are, in effect, a sunk cost, and sunk costs earn no return in competitive markets.

But even if corporations have disequilibrium or monopoly power in product markets—through innovation; patents, copyright or other governmentally granted monopolies; product cascades and network effects that make using the leading product more attractive to consumers; or increasing returns to scale—so that they can earn excess returns on sunk costs, there is no reason why corporations should give those returns to shareholders. From the perspective of corporations, dividends are a gift, and self-interested rational maximizers don't give gifts.

More precisely, firms might pay dividends to establish a reputation in the financial markets, during start up periods where they are in desperate need of cash, but once they succeed and can fund operations with customer money—that is, once they are profitable enough to pay dividends—rational firms would simply exploit their reputations and defect. They'd promise to pay dividends when they can't and change their (metaphorical) minds if they can. Looked at from the other direction, shareholders' investments in the firm are a sunk cost, and sunk costs earn no returns in competitive markets.

All this is elementary introductory economics. If the simple models were right, rational investors, expecting no returns, would pay nothing for stock. In short, standard rational actor-based economic theory combined with the actual legal rights of shareholders, leads ineluctably to the conclusion that the stock market cannot exist.

But companies do pay dividends, and the stock market does exist, and investors are willing to pay real money in order to receive the right to a dividend should the company choose to declare it. So something must be going on not that is not captured in the rational actor economic models. That something is our multifarious, efflorescent stories of shareholder entitlement, inconsistent in every respect except their insistent moralistic demand that corporations voluntarily turn over large quantities of corporate wealth to shareholders. To which we must add our oft-expressed shock and outrage that this form of charity recharacterized as righteous entitlement—a modern *droit de seignor*—is not more widespread.

In the end, the existence of our public stock markets and the corporations that they participate in depends more than anything else on the myth of the shareholder as entrepreneur. A clear-eyed vision of shareholders as passive, diversified investors in a competitive market, with little to sell but the most fungible of all fungible commodities—cash—would lead to market collapse. The "mists of metaphor"[66] that cloud corporate law thinking do more than confuse lawyers: they are essential to the very survival of the stock market as we know it.

Shares are variously referred to:

- as "owners" of the firm (but not responsible for its actions) or of its profits (but not its losses),
- as creators or contributors of the firm's capital, although successful firms must create profits from the actions of employees, suppliers, lenders, and the firm itself,
- as entrepreneurs (although corporate law bars shareholder from managing the firm),
- as principals of the firm's agents entitled to the product of their labor (but not responsible for their obligations or bound by their actions),
- as bearers of its risk entitled by virtue of the limited insurance they purportedly provide to compensation that no real insurer could command, or
- as tools in the hands of heroic traders able to make money by magic, mystically moving paper until real wealth appears.[67]

First, it is important to see that we are in the realm of myth, not plain readings of clear legal texts. The narratives don't reflect the law. Shareholders are not owners, principals, residual risk bearers, entrepreneurs, or even gendered human beings, male or female.

Ownership is simple. Owners have the right to buy, sell, hold, consume, or destroy. Public shareholders don't. If they did—as sole shareholders do—no one would make speeches about how companies *ought* to be run in the shareholders' interests. Owners act according to their will, regardless of what anyone thinks are their interests.

Agency and trust metaphors, often invoked to solve the problem that any shareholder who tried to invoke real property rights would be immediately arrested for trespass or theft, aren't any more based in law. Shareholders can't be the company's principal or they'd be liable for its obligations under black-letter agency law. In any event, they lack the basic agency rights to direct the agent and to terminate the relationship.[68] Nor are they

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66. Berkey, *supra* n. 9, at 94 (Cardozo, J.) (describing piercing the veil doctrine).

67. For further discussion, see Daniel JH Greenwood, *Introduction to the Metaphors of Corporate Law*, 4 SEATTLE JOURNAL FOR SOCIAL JUSTICE 273 (2005).

68. Restatement (Third) Of Agency §§ 1.01-1.04, 3.01, 3.13, 3.16 (2006).

trust beneficiaries: the business judgment rule assures that corporate law has little to do with the law of trust.

The claim that shareholders are "residual risk bearers" entitled to the residual profit evokes the trading ship predecessors of our modern corporations, where equity investors put up the initial capital and, when the ship returned, received whatever was left after all the contracting parties were paid off. But modern companies don't work that way. The trading ship was a single project, started, done, and wound up. Modern companies exist indefinitely. Modern contracts are continuously and continually renegotiated. Salaries and employment can go up or down at any time. Costs for supplies and prices for products and services adjust with market conditions. Companies borrow and repay loans on an ongoing basis, so the interest rate they pay is always subject to recalibration in light of current market conditions. Indeed, the truth behind the claim that a company is but "a moment in the market" is that, in fact, companies have a great deal of difficulty escaping spot markets for anything more than relatively short time frames. A contract that does not reflect current market conditions is a contract that is going to be renegotiated—or that is going to put some actor into an untenable competitive position.

All this means that stock is no different from the other corporate participants. Every corporate participant's share of the corporate pie is subject to renegotiation on an ongoing basis; the distinction between forward-looking contracts and backward-looking dividends cannot be maintained. Therefore, shareholders will get precisely the returns they are able to negotiate at any given time, given the firm's economic success and the relative power of other participants.

When the stock market, or shareholders, are powerful, they will bear little downside risk: the corporation will cut employment, increase prices, or squeeze suppliers for discounts before dividends will be cut. If they are weak, they will take no residual: if customers are willing to pay more than costs of production, the costs of production—executive salaries if nothing else—will rise to meet the available funds. In any event, even if shareholders were bearing risk, it wouldn't entitle them to the residual. No one gives real insurers all the profits from the insured property while guaranteeing them a generous stop loss in the event of losses.

And, if it needs saying, public shareholders, as shareholders, are not entrepreneurs. Investors in the secondary stock market provide no expertise or ideas. They supply no direct capital to companies and absorb none of its losses, although the existence of the secondary market clearly helps companies raise money in the primary market and often allows them to use newly issued shares as a kind of private currency to purchase employee labor or other companies.

Even in the primary public market, share purchasers are purely fungible providers of a purely fungible commodity, money. This role has no entrepreneurial function whatsoever. Indeed, without examining the details of a particular deal, it is simply impossible to know whether the capital provided by primary stock sales actually protects other corporate participants from risk, helps them to make better use of the resources they provide, or—as often seems to be the case—simply passes through the firm and out into the hands of earlier investors, agents or genuine entrepreneurs.

In any event, primary market stock sales are relatively unimportant for most successful companies. Equity capital may well insulate other corporate participants from crisis, but generally that capital doesn't come from shareholders. Instead, the vast bulk of an established company's capital comes from its ability to charge its customers more than it must pay all its factors of production, shares included—which is another way of saying that the company itself, in its ability to organize people and capital more efficiently than a market, is responsible for both its economic profits and its accumulated surplus.[69]

CONCLUSION

The narratives, then, are not reflections of the law. Instead, they are basic forces that make the system work. People pay for the right to receive a dividend they rationally *shouldn't* expect to get because they *do* expect to get it, and the reason they expect to get it is because we say that shareholders own the company, are its principals, and are entitled to the fruits of entrepreneurialism and the residual, all as a matter of myth, not law.

Shares have value, it seems, in defiance of ordinary economics. But the value is real. It reflects not economic but ideological power. So long as shares, not managers, hold the managerial title; so long as shares, not employees, are straightfacedly described as being the source of the corporation's collective product; so long as the stock market—our most heavily, if insufficiently, regulated market—remains the paradigm of a "free" market; so long as the financial industries, coddled, inefficient, overpaid, and heavily subsidized, have an audience for their stories of Randian self-sufficiency; so long as upward redistribution of income and wealth maintains its green aura of naturalness, for just that long the stock markets will prosper where the railroads failed. Not economics but sociology—and specifically, the power of ideas—explains why corporations still run scared of their shareholders to any degree, why executives are able to seize an ever-increasing part of the corporate pie, and why investors in the public securities markets are willing to pay large sums for a legal package that, as a matter of law and economics alike, entitles them to virtually nothing.

69. Coase, supra n. 31.

In short, corporations pay dividends because corporate managers believe that their job requires them to do so. Shareholders expect to receive dividends because they believe corporate managers believe that.

The law is not a brooding omnipresence in the sky. And, contra Cover, in this area at least it is not violence by judges.[70] Cover's other narrative, of law generated by communities, is more apt. Our corporate law is a pale reflection of social struggles that play out, in general, in the far more fertile fields of our minds and allegiances.

Share influence in the corporation, share appropriation of corporate profits, and share value in the public markets are all functions of stories, not coercion. The shares have no power to take, only to persuade us to give. And give we do.

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70. *See generally*, Robert M. Cover, *Violence and the Word, in* NARRATIVE, VIOLENCE, AND THE LAW, *supra* n. 1, at 203; *y*, Cover, *supra* n.1, at 95.